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PRE-TRIAL IN WEST VIRGINIA

WRIGHT HUGUS*

UNFORTUNATELY for me, and for those too who have the fortitude to read this article, I advanced the idea in my address at the annual meeting of the State Bar in August, 1952, that we should have pre-trial conference practice in West Virginia. I said "Required pre-trial conferences (particularly in negligence cases) would save much time, probably prevent many suits from going further and even from being brought in the first place. Such a system would, I believe, make the trial of this kind of action a dignified affair; would get rid of the hypocrisy now present in the settlement of cases, stimulate our and the public's regard for the profession."

There are really two phases of pre-trial. One involves discovery as provided for in Rules 26 to 37 of the Federal Rules of Civil Procedure, and the other, the pre-trial conference feature as provided in Rule 16.

Prior to the adoption of Rule 26 in 1938, discovery in the federal courts was a practical matter limited to equity cases and was not really discovery as we regard it now, but the securing of proof in advance of a hearing, for submission as evidence. It was nothing more than a limited form of our West Virginia practice in equity cases. But Rule 26 is something else. It permits the taking of a deposition to discover what, if any, evidence is available; Rule 33 permits the service of interrogatories upon an adverse party and the latter is required to make full answer thereto subject to his rights under Rule 30 (b). Rule 34 permits the compulsory production of an adverse party's documents, books, etc.

Of course, it will take time to have the rules finally interpreted so that the parties' rights and obligations are definitely established. One need only read the opinions in the case of *Hickman v. Taylor*,¹ to realize what difficulties have already arisen.

This case, as far as the matter before the supreme court was concerned, involved "the extent to which a party may inquire into oral and written statements of witnesses, or other information, secured by an adverse party's counsel in the course of preparation for possible litigation after a claim has arisen. . . ." The owners

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¹ 329 U.S. 495 (1947).

of a tug boat which sank, five members of the crew drowning, employed a lawyer to take statements from the surviving crew members, as well as from other possible witnesses. A suit was brought against the tug owners and as a preliminary matter, plaintiff sought by interrogatories to find out if the tug owners had taken statements, and if so, to produce them.

Petitioner proceeded on the theory that Rule 33 was involved; the district court (for the eastern district of Pennsylvania) thought that both Rules 33 and 34 were involved; the circuit court of appeals thought² that Rule 26 was applicable; while the Supreme Court held finally that it was Rule 33 which governed.

The *Hickman* case clearly shows the difficulty federal courts have had in interpreting the pre-trial discovery rules. One will find decisions on pre-trial discovery in practically every issue of Federal Rules Decisions. But from them we reach the general conclusions that, as Judge Irving R. Kaufman, United States District Court for the Southern District of New York, has said, (1) "The Federal rules seek to compress or narrow the issues so that at trial litigants need produce evidence only on residual matters which remain in dispute. . . ." (2) "The rules seek to obtain evidence for trial" (3) "The rules seek to secure information as to evidence that may be used at trial and to determine how and from whom that information may be produced. . . ."

The proponents of the pre-trial discovery practice (I am not here talking about the limited pre-trial conference) argue that it is a natural outgrowth of the complications which arose when common law pleadings ceased to be oral and were reduced to writing. Then arose fine distinctions, intricate pleadings and cross-pleadings, arguments and re-arguments, delay and more delay, and juries confused by the involved pleadings. When oral pleadings were used the presiding judge really framed the pleadings and a point was reached very quickly when the issues were settled. With written pleadings, it is claimed that "the judges were in no way concerned with what the parties brought forward,"³ and were forced to try the cases as the lawyers presented them and to permit issues in the case which had no factual support. It was to remedy these conditions that the pre-trial discovery practice grew up.

² 153 F.2d 212 (3d Cir. 1945).

³ Sunderland, *Theory and Practice of Pre-Trial Procedure*, 36 MICH. L. REV. 215 (1937).

It is claimed that great abuse results from the broad discovery privileges granted by the federal rules. They permit the taking of pre-trial examinations "regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . . It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."⁴ Of course, in our West Virginia practice in equity cases we meet with "fishing expeditions" too. But the federal rules, it is claimed, encourages the abuse. A deponent who refuses to answer a question, or a person who refuses to produce a document does so at the risk of being ordered to appear in court and defend his refusal. The court may order him to answer or produce. He may be held in contempt.

It is further argued by those opposing these discovery rules that the powerful and rich party may use the "discovery" for intimidation purposes. He may force the adverse party to appear by counsel all over the country at great expense and for no good purpose; puts him in the difficult position of showing bad faith; and that in order to avoid the great expense of pre-trial discovery, he is forced to make an unconscionable settlement.

With only a limited experience with pre-trial discovery in federal courts, my feelings on the subject are in a confused state. I have observed examinations of witnesses which I had no doubt were made in bad faith and with no possible relevancy. On the other hand where the issues have been clear cut, the lawyers ethical and interested in arriving at the true facts, discovery is of great advantage in the expedition of a final disposition of the case.

The nearest we have to discovery before trial in West Virginia courts in law cases is that afforded by Sections 2 and 4 of Article 4 of Chapter 57 and Sections 3 and 4 of Article 5 of Chapter 57, West Virginia Code 1931. Section 2, Article 4, permits the reading of a deposition of a witness which may have been taken prior to trial because the witness (1) resides out of the state, (2) is in the service of the state or the United States, and (3) is out of the state and for good cause will probably be out when the case is tried. Sections 3 and 4, Article 5 of Chapter 57 permit, upon the filing of an affidavit, the issuance of a subpoena duces tecum requiring the production of books of account, or other writing or paper.

⁴ Rule 26 (b).

Some states have provision for pre-trial discovery by deposition and permit the greatest latitude in the examination of witnesses. Our own state provisions for pre-trial discovery are very limited when contrasted with federal rules. Under the federal rules,⁵ a party refusing to testify may be required, upon petition of the other party, to do so by the court. But this means the necessity of traveling long distances to appear, at least some expense, certainly delay, sometimes briefs and argument.

I do not mean to argue against the pre-trial discovery procedure. The theory is sound but can be abused to such an extent as to raise at least a doubt as to its efficacy. Much depends upon the good faith of the lawyers seeking "discovery". Do they in any particular case have honest indications that the other side has information vital to the claim and which is being withheld, or is it only to harass?

So much for pre-trial generally.

My plea in the aforementioned address for pre-trial use in our state courts was particularly addressed to the pre-trial conference between judge and counsel.

I am indebted to Harry D. Nims, Esq., of the New York City Bar for much of the material which follows. His treatise⁶ gives an excellent background for the whole pre-trial subject, the procedure, pre-trial conference and the effect of the same. It can modestly be described as a scholarly presentation in an interesting though detailed manner of what most lawyers no doubt think a dry subject.

The pre-trial conference practice was used in a few state courts prior to the promulgation of the federal rules in 1938. Its first reported use was by Judge Ira W. Jayne, chief judge of the third judicial circuit of Michigan in 1929. Since the publicity given his practice it developed that the practice was used in other jurisdictions even prior to 1929, sometimes by local court rule or custom. Having its origin in informal conferences between judges and lawyers, it became so successful in speeding up the disposition of cases, that many courts adopted the system but with varying procedural rules. The cooperation and the forthrightness of the lawyers contributed largely to the success of Judge Jayne's experiment.

The Michigan experiment led to the inclusion of Rule 16 in

⁵ Rule 30 (b).

⁶ NIMS, PRE-TRIAL (1950).

the Advisory Committee's report to the Supreme Court and its ultimate adoption by Congress as one of the rules.

Rule 16 of the Federal Rules of Civil Procedure for District Courts, reads as follows:

"In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

"(1) The simplification of the issues;

"(2) The necessity or desirability of amendments to the pleadings;

"(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

"(4) The limitation of the number of expert witnesses;

"(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

"(6) Such other matters as may aid in the disposition of the action.

"The court shall make an order which recites the action at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

The procedure, as I have observed it, and as appears from discussion with lawyers and judges in other districts runs pretty much as follows: (1) The judge gets the file in the case some time before the next term of court convenes, and studies it to such extent as will permit him to determine whether or not a conference would facilitate the disposition of the case. It is not mandatory. In some jurisdictions I understand that a lawyer on one side or another of the case may request a conference, and generally, if this be done, the court grants the same. The court may enter an order setting a definite time for the conference or as is generally done, gives an informal notice through his clerk that a pre-trial conference will be held on a certain day. The date for this hearing should not be too far in advance of the date of the trial but at the same

time it should give counsel opportunity to change trial plans such as securing witnesses if the determination of the issues puts a different light on the whole case, or changes his plan of trial if issues have been eliminated at the conference. At the conference, the first matter to be taken up is a determination and simplification of the issues in the case. In federal district courts the statement of the claim is ordinarily a simple affair, as is also the statement of the defense. In common law pleading states, however, the real issues may not be apparent from the pleadings, and in such states pre-trial conferences are most valuable. If there is any attack on the pleadings, a discussion of the issues involved may well settle the pleadings. The plaintiff states his case, what he expects to prove, the exact nature of his claim; the defendant then states his side of the controversy. After discussion back and forth and questions from the judge, the issues really to be tried are settled, rulings on any pending motions are made; the chaff in the pleadings is thrown out; the judge then dictates to his reporter the issues as he finds them or as they are stipulated by counsel. With issues settled, the matter of proof is discussed. The judge then inquires as to what facts might be stipulated. For instance in a personal injury case, counsel can agree on the corporate character of the defendant, that the person alleged to have been negligent was the servant or agent of the defendant at the time of the accident, where and when the accident occurred, oftentimes the extent of the injuries, hospital records, age of the injured party, marital status, etc.

Documents are identified if counsel agree they are genuine and when the case is tried, are offered in evidence without the necessity of proof. The court rules on their admissibility, generally at the trial. Of course, agreement is not always reached and if not reached, the judge does not or should not force the non-stipulating party unless there is no doubt but that the refusal is a mere sham. Once stipulations are made, the judge then dictates them to his reporter in the presence of counsel giving counsel further opportunity to clarify.

Some judges request counsel to furnish the names of their respective witnesses, and what is expected to be proven by each witness. This idea is not favored by many lawyers who feel that the other side has no right to know who will be witnesses. In the conferences in which I have participated, the judges have not asked for this information. Those favoring this disclosure argue that if

one side is bluffing and the suit is not in good faith, this fact will show up by a call for the witness. Some judges report that this has been their experience and more than a few cases have been dismissed following a disclosure. Other judges report that many settlements are made when the plaintiff reveals his witnesses and the testimony they will give.

The date for the trial is oftentimes fixed at a pre-trial conference, and discussion had as to the probable length. Most judges insist that the lawyers who will actually try the case be present at the pre-trial so that questions concerning the meaning and effect of the pre-trial order may not later arise. The advantage of knowing exactly when the trial will be had is certainly a great advantage to lawyers. It eliminates the uncertainty of when to have witnesses present and the like.

If expert witnesses are to be used, the judge may limit the number to prevent an unnecessarily long trial.

In some jurisdictions such as New York City where there are several departments or divisions of one court, a judge is often assigned for a limited period to conduct the pre-trial conferences for the whole division, although he will not be the trial judge. While it would seem that as with counsel, the judge conducting the pre-trial proceeding should be the judge assigned to try the case, the present practice in New York has apparently worked well and has done much to relieve the heavily loaded dockets.

Judges differ as to whether the pre-trial conferences should be held in the judges' chambers or in open court. Those favoring open court claim that the proceedings are judicial proceedings, and that since an order is to be entered, it should have the dignity which a formal hearing would give it.

While it may seem to be a more or less unimportant point, I strongly favor hearings in chambers. The whole pre-trial conference idea, if it is successful, depends upon the integrity of the lawyers participating. Lawyers sitting informally around with a judge are not apt to withhold information pertinent to the conference and the order to be entered, or likely to distort the facts,—at least not after a friendly and frank discussion. The judge may even call the lawyers by their first names or give other indications of a mutual confidence. Lawyers in an informal gathering are more apt to disclose the real situation. I must admit however, that in New Jersey, where pre-trial has been most beneficial, the

hearings are held in open court. I would not hesitate to bring up in chambers a matter however seemingly trivial while hesitating to do so in a formal hearing, if such matter was one that could be disposed of on pre-trial and if not so disposed of, would arise on trial.

One of the most irritating features to jurors, parties and witnesses in the trial of personal injury cases in the practice of settling cases just before or during the progress of a trial. A jury has been summoned, witnesses are present, parties are anxious and then the lawyers retire to the judge's chambers and for an hour or more discuss a settlement. If there is an insurance carrier, long distance calls are made. The lawyers come back into court and announce that the case has been settled. The jury is excused for four days as the lawyers had informed the court previously that the trial would take three or four days, and no other cases have been set. And there you have it!

All of this raises the question as to the propriety of the pre-trial judge in the conference inviting or suggesting a settlement or a discussion of it. There seem to be three distinct theories on the practice of discussing settlements. The first is, of course, that it is no business of the judge to urge or even suggest a settlement and many judges take this position. The second theory is that the judge politely and without showing any leaning suggests that to him it appears to be a case for settlement. If there is no response from counsel, the subject is dropped. The third line is that the judge in effect tells counsel at the conference that from what he has heard in the conference, the plaintiff will prevail and the only question is the amount of damages. In other words, he tells counsel for the defendant that he should go and settle with plaintiff at the best price attainable.

The first theory seems best to reflect the strict judicial attitude. Few of the older type lawyers and the jury-loving trial lawyers approve of the judge forcing counsel to settle. Of course, if the court after the conference can say that if the evidence was as related by counsel such as to require him at the trial to render a summary judgment or direct a verdict, then there might be good reason for talk of a settlement. But it is difficult to see under such circumstances that any settlement is in order.

Lawyers will not have confidence in a judge who attempts to force settlements. They will not be inclined to be cooperative or to

made full disclosure at the conference, but rather withhold information and take their chances at a trial. It is difficult for a lawyer to resist the importunities of a judge, but at the same time unfair to his client not to do so. The remarks of Judge Cloyde B. Ellis of the 18th judicial district of Nebraska are pertinent on this point.

" 'The matter of discussion of settlement is a very delicate and dangerous phase of pre-trial. If the lawyers get the idea that the judge is using this tool to force or to exert pressure for settlements, irreparable prejudice to the usefulness of pre-trial will be created. I think some judges' conception of pre-trial is that it affords a method of reducing their work through disposition of cases without trial. It is not the business of judges to create pressure either direct or indirect for settlement or by any means, no matter how subtle, to compel litigants to settle their differences without trial. The business of judges is to afford the litigants an impartial trial of their differences according to law. The demonstrable fact, if existent, that they would be better off to settle does not change the Court's responsibility. . . . I think the judge is justified, after all other things are out of the way, in asking if there has been any discussion of settlement. If the response is in the affirmative, it is proper for the judge to inquire if they wish to continue the discussion and even to suggest that any further discussion should occur at this time. Discussion between the parties may afford an opportunity for the judge to exercise a gentle influence toward accord which will not be offensive to either side. If the parties say there has been no discussion and that they do not care to discuss it, then that should end it.' "

There is considerable sense in the view that both parties are loathe to suggest settlement at pre-trial conference. Neither side wants to give the judge the impression that his case is weak. But they may be delighted with a suggestion from the court that a settlement appears to be in order.

The contrasting approaches are well illustrated by the following two accounts of pre-trial conferences. One⁷ was before Judge B. M. McNally, justice of the supreme court (New York) and the second⁸ before Judge Alfred P. Murrah of the tenth circuit court of appeals. As to the first one before Judge McNally it is only fair to say that the apparent practice in some New York courts where

⁷ *Id.* at 65-66.

⁸ *Id.* at 238-242.

⁹ *Id.* at 219-232.

calendars are heavy is to have a pre-trial calendar of those cases where settlements appear to be likely.

"Mr. Justice McNally: What are you asking in this case?"

"Mr. Brandt: \$7,5000.

"Mr. Justice McNally: Would you step outside, Mr. Brandt, while I talk to the defendant's attorneys?"

"Mr. Brandt stepped outside.

"Mr. Justice McNally (to counsel for the defendants): This seems to be a liability case. Some one or both will have to pay eventually. How do you claim the accident happened?"

"Mr. Weeks: It is our claim that the New York City Omnibus ran into the rear of our standing truck. I do not think there is any liability on our part.

"Mr. Justice McNally: What do you have to say with reference to that, Mr. Cole?"

"Mr. Cole: It is our claim that the truck stopped abruptly without any signal.

"Mr. Justice McNally: The question of liability between you defendants will have to be explored more fully. What do the Motor Vehicle reports show?"

"Mr. Cole reads the New York Motor Vehicle report of accident filed by the bus driver, which seemed to bear out his theory of the happening of the accident.

"Mr. Weeks: We will rest on the statement that we were standing still when we were struck in the rear. I will offer only a nominal sum—\$100.

"Mr. Justice McNally: Will you increase your offer?"

"Mr. Weeks: I will offer \$200.

"Mr. Justice McNally: Make it \$250.

"Mr. Weeks: All right, I will offer \$250.

"Mr. Justice McNally: I have reviewed the medical record, and I think the case is worth \$3,000. There is no question some one or both are liable.

"Mr. Cole: I am disposed to follow your Honor's recommendation in this matter.

"Mr. Justice McNally: I will talk to Mr. Brandt.

"The attorneys for both defendants stepped outside. Mr. Brandt re-enters.

"Mr. Justice McNally: What are you really looking for in this case?"

"Mr. Brandt: I value it at \$3,000 to \$4,000. I think that is about its real value, but will have difficulty with my client.

"Mr. Justice McNally: Will you recommend you client accept \$3,000? I think that you should, in view of the fact that the hospital record shows a prior condition with reference to a narrowing of an intervertebral disc and an admission that your client slept on a board, prior to the happening of the instant accident.

"Mr. Brandt: I will recommend \$3,000.

"Mr. Justice McNally: Let me talk to the defendants.

"Mr. Brandt steps outside; the attorneys for defendants enter.

"Mr. Justice McNally: I have stated before this case has a value of \$3,000.

"Mr. Cole: I will pay up to \$3,000, if the other defendant will contribute \$250.

"Mr. Justice McNally: He said he would. Bring in Mr. Brandt.

"Mr. Justice McNally: Mr. Brandt, I call attention to your hospital record which shows symptoms of a condition that is probably congenital—a slight scoliosis.

"Mr. Brandt: I said that the woman had a bad back before the accident. That is the reason I will be willing to recommend that she take \$3,000.

"The defendant's attorneys re-enter.

"Mr. Justice McNally: The settlement is \$3,000.

"Mr. Cole: I will pay \$2,750.

"Mr. Weeks: \$250 is my limit.

"Mr. Justice McNally: Case marked settled \$3,000.

"Dated: February 15, 1950."

The other, by Judge Alfred P. Murrah, of the United States Court of Appeals for the Tenth Circuit, a strong advocate of pre-trial system, was given before the Nebraska Bar Association and illustrates the practice of merely inquiring into the possibility of settlement.

"Judge Alfred P. Murrah, Presiding.

"Gentlemen, the case of Agnes Pennybacker vs. Ajax Wholesale Company and John Travelor: From a cursory examination of the pleadings it appears that this is a suit for damage for personal injuries sustained on June 8, 1949, on Highway No. 6 at a point approximately three-fourths of a mile northeast of Gretna in Sarpy County, Nebraska."

"Judge Murrah: . . . There is one other thing that I always mention in connection with these pre-trial conferences. It is obvious that this case . . . will go to the jury. The question, of course is the amount of damage for the injury. I just inquire whether or not you have discussed the matter of a settlement.

"Mr. Van Pelt: There hasn't been any discussion of settlement worthy of consideration.

"Judge Murrah: That's all right. The Court hasn't any disposition whatsoever to require you to make a settlement or to coerce you into a settlement. You should evaluate your clients' case in the light of the facts, and it is not for the Court to say, but I do think this is a case in which you might be able to arrive at some agreement.

"Mr. Healey: Considering the plaintiff's disposition, I don't believe we can ever get together.

"Judge Murrah: . . . Is there anything else?

"Mr. Van Pelt: Nothing that we have."

Irwin W. Roemer, Esquire, a very prominent trial lawyer of the Chicago bar, who appeared at our state bar's annual meeting last August and delighted his listeners, believes settlements should be discussed. He says:

"I believe it to be the duty of the Court to encourage discussion of settlement in pre-trial conferences. I realize that some lawyers resent such attempts on the part of the judge; but I am satisfied that the intervention of the judge often promotes a fair settlement. As you well know, counsel are often reluctant to open such a discussion for fear that it might be taken as an admission of weakness. I do not believe that the judge should exercise any undue pressure on either counsel. I have sometimes found that when counsel for the respective parties have agreed upon an offer of settlement, one of the litigants refuses to be guided by his lawyer's advice. In such instances the influence of the Court oftentimes persuades the recalcitrant litigant."¹⁰

Some judges take the view that it is a waste of time to talk about the pleadings, issues, etc., before exploring the possibility of settlement. It seems to me that this throws us back to the primary question—are the judges and the lawyers honestly and in good faith conferring in order to reach a fair disposition of the case and furthering a just administration of justice? If the judge is not putting pressure on the lawyer and is not trying to avoid the labor involved in the trial of the case, then I say the matter of a settlement may profitably be explored as was done by Judge Murrah in the foregoing demonstration. I do not see how a judge can discuss or force a discussion of a settlement until he knows the actual issues and the positions of each side as they are developed and produced at the pre-trial conference. I have never been on the bench and I may be all wrong, but from a lawyer's point of view, if ethical and believing in his case, I resent being told by a judge that I should settle a case. I know the case, at least I know what my client has told me and I have reason to believe he is honest; I have examined witnesses, studied the law involved, and I do not see why

¹⁰ *Id.* at 66-67.

I should be intimidated into making a settlement; certainly, not until it has been clearly developed at a conference that my theory of liability is all wrong, or that my client may not be telling the truth.

When it develops that my theory of the case *may be wrong* or that the facts are not certain then settlement is in order. It is not the duty of the judge to direct me to settle but it is my duty to tell my client that his case is not a sure one and it is my further duty to suggest that he (client) authorize me to make a settlement. I do not object to a judge suggesting that if counsel are contemplating a settlement that it be consummated within a certain time and that the lawyers report back so that the jury need not be called for the trial date or so that the calendar may be so rearranged to permit the speedy trial of other cases.

Lawyers before engaging in a pre-trial conference are naturally interested in the character and binding force of the stipulations they make and the orders entered at such a conference.

The federal rule gives a finality to the order entered at or as a result of the pre-trial conference. Generally such a proposed order is submitted to counsel who participated in the conference before its entry so that there may be no misunderstandings. Once entered, it is final unless at the trial the court may modify the same to prevent manifest injustice. In several states too the order entered following the pre-trial conference is binding. Generally this is by court rule, sometimes by statute. But both under federal and state rules, the aim is to have a clear order leaving nothing but the question of the admissibility of evidence for the trial.

Along this line as far as state rules are concerned, the opinion in *Jenkins v. Devine Foods*¹¹ is interesting. This was a New Jersey case. New Jersey has been, after Michigan, probably foremost in the development of pre-trial practice, particularly under Chief Justice Arthur T. Vanderbilt. There the pre-trial order is binding but at any time before the trial the order may be amended in order to prevent injustice. The *Jenkins* case involved the extent and effect of a pre-trial order under the New Jersey rules. The defendant had shipped on order to the plaintiff certain plastic ware. The plaintiff returned to the seller

¹¹ 3 N.J. 450, 70 A.2d 736 (1950).

a part of the shipment as being defective. Following the pre-trial conference an order was entered reading as follows:

"This is an action arising out of an alleged breach of contract, plaintiff charging that before discontinuance of an agreement between the parties with reference to the distribution of Devine Plastic Ware, another agreement was entered into in writing on August 12, 1947, under the terms of which plaintiff returned defective merchandise and defendant issued credit memorandum No. 3 in the sum of \$2,216.97 and credit memorandum No. 4 in the sum of \$3,451.80; said agreement further providing that credit was to be paid by monthly deduction from payments to become due for future shipments; that certain conditions with respect to shipments would be corrected, and that the goods shipped would not be defective.

"Defendant denies any breach of agreement and maintains that it complied with the same in all respects and has in no manner prevented plaintiff from using the credit memoranda issued and that it is and has been at all times, ready, able and willing to perform."

Defendant contended that by the order entered following the pre-trial conference, plaintiff was confined to the proposition that defendant had prevented plaintiff from using the credit memoranda and moved to dismiss the case. The court denied the motion stating that "We will hear what the facts are, and I will deny the motion. Let us hear the facts and determine it." The court let the case go to the jury upon issues other than stated in the pre-trial order.

The New Jersey Supreme Court reversed the lower court holding as follows:

"Rule 3:16 sets up the pre-trial procedure. It requires that in every contested action, except an action for divorce or nullity of marriage or an action brought in a summary manner under Rule 3:79, there shall be a conference in open court to consider the simplification of the issues, and the other matters there enumerated or referred to, and that the court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered and which limits the issues for trial to those not disposed of by admissions or agreements of counsel, which order shall be signed by the court and the attorneys for the parties. The rule as it was at the time of this trial further provided that the order, when entered, should control the subsequent course of

action, unless modified at the trial to prevent manifest injustice. The order in the instant case was such an order, signed by the court and counsel and entered. It reserved no issue presented by the pleadings and not restated in the order. . . .” And our sister state, Virginia, has a similar rule.

“Rule Four of Rules of Supreme Court of Appeals of Virginia, (effective February 1, 1950):

“In any civil case, the court of its own motion or upon timely motion of any party, may direct the attorneys to appear before it for a conference to consider:

“(a) Simplification of issues;

“(b) Amendment of pleadings, and filing of additional pleadings;

“(c) Stipulation as to facts, documents, records, photographs, plans and like matters, which will dispense with formal proof thereof; and

“(d) Such other matters as will aid in the disposition of the case.

“Upon consideration of the above matters the judge shall make an appropriate order which will control the subsequent conduct of the case unless modified before or at the trial or hearing to prevent manifest injustice.”

While I do not find any Virginia cases which have passed on the effect of a pre-trial conference order, other jurisdictions having similar or near similar rules have held, (1) that stipulations made by counsel at such conferences are binding,¹² (2) that a statement in such an order as to the issues is final and other issues may not be raised at the trial,¹³ (3) counsel may not argue at the trial questions not within the scope of the issues framed,¹⁴ and (4) instructions to the jury inconsistent with the pre-trial order should be refused.¹⁵

The order, however, may not confer jurisdiction when none existed.¹⁶ And in *Gratiot Lumber & Coal Co.*¹⁷ failure to amend the pleadings at the pre-trial conference was held not to be fatal.

¹² *Mitchell v. Walton Lunch Co.*, 305 Mass. 76, 25 N.E.2d 151 (1939).

¹³ *Jenkins v. Devine Foods*, 3 N.J. 450, 70 A.2d 736 (1950); *Fowler v. Crown-Zellerbach Corp.*, 163 F.2d 773 (9th Cir. 1947).

¹⁴ *Gurman v. Stowe-Woodward*, 302 Mass. 442, 19 N.E.2d 717 (1939).

¹⁵ *Mead v. Wiley Methodist Church*, 4 N.J. 200, 72 A.2d 183 (1950); *Gurman v. Stowe-Woodward*, 302 Mass. 442, 19 N.E.2d 717 (1939).

¹⁶ *Miles Laboratories v. Seignious*, 30 F. Supp. 549 (D.C.S.C. 1939).

¹⁷ 309 Mich. 662, 16 N.W.2d 112 (1944).

The federal rule and most state rules permit a modification of a pre-trial order "to prevent manifest injustice."¹⁸

Some typical pre-trial conference orders are attached hereto as an appendix.

In spite of the fact that some organized bars have strenuously opposed the pre-trial conference practice, we find it steadily gaining. The opposition has been based mainly on the objections, (1) that the court is taking away from the jury, questions which are jury questions, (2) that judges pressure lawyers into making admissions in order to avoid work, (3) that trial lawyers do not have a chance to glamourize the situation to a jury and that a lawsuit is no longer a pitched battle between counsel. Lawyers in rural communities claim that the practice spoils the entertainment afforded the public by witnessing a good show in a courtroom. They do not exactly put it this way but argue that a good, sporty trial is good for democracy.

We lawyers object to changes. We are set in our ways and criticism after criticism from the public of our conduct affects us but little. Recently a prominent business man¹⁹ of this state who had just finished a period of jury service writes of his experience and impressions in part, as follows:

"In spite of the utmost consideration and courtesy shown the jury panel by the Court, its officers, and attendants, I was able to understand the irritations, many of them needless, which jurors experience. These in turn are, in my judgment, largely responsible for the widespread aversion to jury service among reputable, qualified, and otherwise available citizens.

"The waste of jurors' time during a court term is almost unbelievable. I decline to accept the easy view that most of it is unavoidable; unless we wish to continue, as in the past, to make no effort to solve the problem.

"The individual juror sits for hours chained to the ready requirement, despite the effort of many judges . . . to keep these wasted minutes and hours to a minimum. Multiply the experience of each juror by a panel of 40 and the extravagance in time waste becomes enormous.

"The trouble is that the whole procedural mechanism is geared to the convenience and requirements of everybody

¹⁸ *Roberts Electric v. Foundations & Excavations*, 8 N.J. Super. 168, 73 A.2d 744, 5 N.J. 426, 75 A.2d 858 (1950); *Phoenix Mutual Life Ins. Co. v. Flynn*, 171 F.2d 982 (D.C. Cir. 1948).

¹⁹ Charles E. Hodges, Esq., Managing Director, Charleston Chamber of Commerce.

EXCEPT the jury. Its members must be ready at all times for whatever betides all other principal personalities and factors in a jury trial.

".....
 "Yet plaintiff, defendant, counsel, witnesses, court officers, in fact all others seem to outrank the jury where the factors of availability, convenience, adaptability and all other elements affecting the time schedule of trial are concerned."

".....
 "For these circumstances, I feel the apathy of the Bar is primarily responsible. By the same token, I am confident that a determined effort by a united Bar to remedy them would be successful."

Although these remarks were made with respect to service on a jury in a criminal court, we know they are applicable to civil trials as well. While pre-trial conferences may not eliminate all delay in the selection of a jury, they certainly will speed up the trial. The jury is told in simple language what the issues are; the lawyers are not out in the corridor or judge's chambers talking settlement. This has been explored before and found impossible. With the issues determined, lawyers have had more time to concentrate on the law involved. One does not need to worry about the "issues" which have been eliminated at the conference. While the admissibility of the evidence has not been passed on, the issues have been so narrowed that a lawyer can thoroughly brief the remaining points, so that a judge can quickly pass on any legal points remaining; in fact, having had the advantage of the conference, he may have satisfied himself on all points and the necessity of taking lengthy recesses does not arise. The trial proceeds orderly and speedily.

There are many ways in which a pre-trial conference may be helpful to a lawyer. Let us consider one example. A suit has been brought against the retailer of a glass coffee pot for personal injuries incurred by reason of its explosion. The attorney for the plaintiff has proceeded on the theory that the rule of *res ipsa loquitur* is applicable; he has not planned to call any witnesses to establish negligence. Nor has he considered whether it is the manufacturer or the retailer who is responsible. At the pre-trial the judge indicates that he believe it is not a *res ipsa loquitur* case and that if the plaintiff rests following mere proof of the explosion and the damages, the court would be forced to direct verdict for the defendant. Plaintiff's counsel then has an opportunity to prepare

his negligence testimony before trial. And the converse is true. If plaintiff's lawyer has gone on the theory that it is not a *res ipsa loquitur* case and has planned to call numerous witnesses, this may be avoided if the judge in the pre-trial conference holds that the mere happening of the event made a case without more. Of course, to protect the parties an appropriate pre-trial conference order must be entered.

While our income may be reduced by reason of the accelerated administration of court work, the respect we will gain will be worth the small loss of income, and any loss may be offset by an increase in the use of lawyers and courts.

Complacent has been the attitude of the lawyer. He thinks unimportant the spectacle we make before jurors, witnesses and the public when we haggle in the courtroom over technicalities which might well have been disposed of in advance at a pre-trial conference. Lawyers will not be able to delay a trial or a disposition of the case if the real situation is explored. Errors are less likely to be made, reducing the number of new trials.

The work of the court should not be limited to the conduct of a trial. A judge may be settling many matters in chambers preliminary to a trial, be conducting his court to the best interests of parties, counsel and the public. Face to face with counsel the judge asks "what is your claim?" "Why can it not be tried within the next month?" Such questions will develop whether or not the case is an honest one or one of extortion. In one year in the Supreme Court of New York where pre-trial is used, only 4979 cases out of 48116 were actually tried, the balance were disposed of otherwise; and in the same year, in the Massachusetts Superior Court only 13% of the 23832 cases disposed were actually tried.

I believe that greater use should be made of pre-trial practice under the West Virginia rule.²⁰ Other lawyers may disagree with this view but given a degree of cooperation between court and counsel, certainly great good may result. If Virginia, an historical common law state, finds it beneficial, West Virginia should also profit by it.

New drugs to relieve human suffering are coming out almost every day. Should not lawyers and judges take some steps to improve their own profession and the administration of justice or shall we just go on as now?

²⁰ 127 W. Va. vii-viii (1945).

Lawyers who have practiced before our two district judges are aware of the extent to which pre-trial conferences have been had. I have not heard any criticism of the manner in which they have been conducted. Some lawyers have been recalcitrant and refuse to cooperate but the majority are well satisfied with the beneficial results. It takes time to teach us that the old ways may not be the best after all.

It is argued that West Virginia does not have the congested dockets such as exist in the larger cities and that litigation is on the decline. This may all be true but it is no reason why in the trials we do have, conferences should not be had. If but one trial a term, that trial should be conducted in an attitude of dignity and orderliness with due regard to the comfort of jurors, length of trial, expense of litigation and respect for the administration of justice.

APPENDIX

District of Columbia. Pre-trial Orders used in the District Court of the United States for the District of Columbia.

(Venue and title.)	Calendar No.	Civil Action No.
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Pre-trial Proceedings

Statement of Nature of Case:

Suit for personal injuries claimed to have been sustained by plaintiff as a result of flame and lightning coming through the telephone receiver which was part of the telephone equipment installed by defendant at the United States Naval Observatory. Plaintiff is superintendent of the Naval Observatory, and during an electrical storm received injuries while using the telephone at the observatory. Plaintiff claims that defendant was guilty of negligence in installing and maintaining the telephone equipment, that it failed to ground and sufficiently insulate telephone wires, and failed to install necessary protector blocks, failed to install adequate tube insulation and to install adequate shock coils.

Permanent injuries are claimed to have resulted to plaintiff in the following particulars: substantial loss in hearing of right ear, substantial loss of vision of right eye; left eye is also permanently injured but to a lesser degree; plaintiff also maintains he sustained a permanent brain injury and loss of memory and permanent injuries to his head.

Specific acts of negligence will be relied upon, the case not to be submitted by the court to the jury on the doctrine of *res ipsa*

loquitur. By decision of the court of appeals in this case, the first count, based upon the duty of defendant to exercise the highest degree of care, is dismissed by the court.

Defendant maintains that it is not guilty of any negligence in the installation or maintenance of the telephone system; that it exercised the usual care and caution of a prudent person.

Certain exhibits such as doctors' bills, bearing initials of the Court, will be received in evidence without formal proof. Parties also have entered into a written stipulation as to items of evidence, which stipulation is attached to this pre-trial order and made a part of it.

Plaintiff agrees to submit to an examination by a neurologist named by defendant, examination to be made within five days at the office of the physician, it being stipulated, however, that defendant will submit to plaintiff within two days after receipt by it, the report made by the neurologist; and also it is agreed that plaintiff's physician may be present at the examination.

Experts at the trial will be limited as follows: each party will be permitted to call two witnesses as to injuries to plaintiff's ear, two witnesses as to injuries to eye, one as to the brain condition and head injury, and two as to the electrical features of the case, it being understood that in addition to the two last mentioned, each party may use one witness as to the facts as an expert.

Parties stipulate that evidence may be offered in this case as to injury to the brain without necessity of formal allegation of the injury in the complaint.

ESSEX COUNTY COURT

Law Division

(Venue and title.)	Date: May 3, 1950
.....	Docket No.
Plaintiff	
.....	Calendar No.
Defendant	
.....
Attorney for Plaintiff	Attorney for Defendant

Pre-trial Order

The parties to this action or their attorneys having appeared before the Court at a pre-trial conference, the following action was taken.

About 10:30 p. m., March 22, 1949, plaintiff was visiting a tenant of defendant landlord of dwelling premises on Heller Parkway, Newark. Whether she was also a social guest of defendant landlord is a matter of present dispute, plaintiff asking leave to amend paragraph 4 of its complaint to allege invitation by tenant accordingly. Defendant raises no objection. Amendment ordered and deemed made hereby accordingly. On the way out, this social guest fell, suffering personal injuries, for which she presently sues in standard negligence complaint. To this defendant answers denying negligence, also denying the right of a social guest to recover for pure negligence, and setting up contributory negligence and assumption of risk. The negligence as alleged consists in the lack of proper repair of a rubber mat toward the top of a flight of stairs between second and first floors.

In view of the question of law involved on the right of a social guest to recover for ordinary negligence, counsel will concurrently prepare trial briefs to be exchanged and filed not less than one week before the weekly call for trial.

Plaintiff waives the claim in its complaint so far as "hidden trap" is concerned.

Parties stipulate in evidence as reasonable St. Michael's Hospital bill of \$65.

Counsel consent to further physical examination under the rules. Concurrently with the physical examination, plaintiff will furnish defendant with specification of permanent injuries claimed.

Hospital record, when produced in due form, is stipulated for identification.